Theatrical Protective Union, Local One, IATSE, AFL-CIO *and* Twentieth Century-Fox Film Corporation and Motion Picture Studio Mechanics Local 52, IATSE, AFL-CIO. Case 2-CD-603

April 15, 1981

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Twentieth Century-Fox Film Corporation, herein called the Employer or Fox, alleging that Theatrical Protective Union, Local One, IATSE, AFL-CIO, herein called Local 1, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees represented by Local 1, rather than to employees represented by Motion Picture Studio Mechanics Local 52, IATSE, AFL-CIO, herein called Local 52.

Pursuant to notice, a hearing was held before Hearing Officer Randall N. Harakal on October 30 and 31, November 15 and 19, and December 18, 1979, and May 14 and June 15, 1980. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer, Local 1, and Local 52 filed briefs with the Board.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Delaware corporation, with its principal place of business in Los Angeles, California, and other offices located throughout the ited States including New York, New York, is engaged in the business of producing feature length motion pictures. During calendar year 1979, the Employer purchased goods and supplies valued in excess of $50,000 directly from sources located outside the State of New York and had said items delivered to it within the State of New York. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Local 1 and Local 52 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer, a well-known motion picture production company, was in New York City from May 25 through July 27, 1979,[1] filming a movie entitled "Willie and Phil" with a production crew made up of Local 52 motion picture mechanics. On June 4, several scenes were to be shot in Madison Square Garden. Around the beginning of May, Anthony Ray, the executive producer, had made a telephone call to Michael Proscia, business agent of Local 52, to discuss any labor problems which could arise as a result of the filming in the Garden. Proscia called Ray back about 2 weeks later to advise him that he would not be required to hire Local 1 employees for the Garden sequences, even though Local 1 had a contract with the arena. This, according to Proscia, was because Fox would be using only its own equipment and none of the Garden's.[2] He further advised Ray that the exclusion of Local 1 had been approved by Walter Diehl, International president of the International Alliance of Theatrical Stage Employees (IATSE).

On May 31, Ray received a call from Rob Franklin, a Garden employee, informing him, contrary to what he had been told by Proscia, that the film company could not use the Garden until arrangements had been made with Local 1. Shortly thereafter, Ray testified, Robert McDonald, business representative of Local 1, called to let him know that he would have to employ a Local 1 man for every Local 52 man he brought into the Garden and, further, that Walter Diehl had advised him that Local 1 did, in fact, have jurisdiction over any equipment brought into the Garden. When Ray pointed out that McDonald was asking for an entire second crew composed of Local 1 stagehands, McDonald suggested as an alternative that Ray employ a "split crew" by laying off half the Local 52 motion picture mechanics and replacing them with Local 1 stagehands. Ray offered instead to hire two or three Local 1 men "to keep the peace," but McDonald rejected the offer. Ray asked McDonald what would happen if he refused

[1] All dates herein are in 1979.

[2] Proscia told Ray that the only union requirement at the Garden was that Fox hire three or four electricians represented by the International Brotherhood of Electrical Workers. The IBEW electricians were necessary, he explained, because the filming would require the use of the Garden's electrical outlets.

to hire any Local 1 men, and McDonald replied, according to Ray, that he would never get into the Garden. McDonald denied ever having made such a statement.[3] To insure that he would not incur a costly delay, the following day Ray called McDonald and reluctantly agreed to hire 12 Local 1 men, thereby doubling the size of his crew.[4]

When Ray arrived at the Garden the morning of June 4, men from both Locals were present, but none of the movie equipment had been brought into the Garden because, according to Ray, Local 1 men insisted on handling the equipment. Ray testified this violated an understanding he had with McDonald, which was that, if Ray chose not to have Local 1 men handle any of the movie equipment, there would be no objection.[5] In an attempt to get production moving, Ray asked Frank Norton, a member and representative of Local 1, what would happen if he tried to go into the Garden without the assistance of his men. Norton allegedly replied that Ray would be bounced out on his "ass."[6] Ray prevailed upon Local 52 to allow the Local 1 men to help, and with Local 1 employees carrying minor equipment, the first shot was set up inside the Garden. Two other work stoppages occurred during the course of the day's filming when Local 1 employees again attempted to handle the movie equipment.

B. *The Work in Dispute*

The disputed work involves the moving, handling, and placement of cables, props, dollies, cameras, and related equipment at Madison Square Garden in New York, New York, during Fox's filming of motion pictures using only the Employer's own equipment and the Garden as a backdrop for its own performers, and thus not entailing the filming of an event being staged at the Garden.

C. *The Contentions of the Parties*

Fox and Local 52 contend that the work in dispute should be awarded to employees represented by Local 52 based on employer preference. They contend that their collective-bargaining agreement covering the disputed work, coupled with the nonexistence of a labor agreement between Fox and Local 1, also favors an award of the work to Local 52. Fox and Local 52 further contend that employees represented by Local 52 possess superior motion picture production skills, that efficiency and economy of operation is advanced by employing such highly skilled employees, and that industry practice in New York City dictates that film companies assign work of this nature to employees represented by Local 52.

Local 1 takes the position that an agreed-upon method for settling the dispute to which all parties are contractually bound does exist, and that the Board is therefore compelled to defer to this voluntary dispute-settling mechanism. Furthermore, it asserts that a special practice and agreement within the industry and the International Alliance of Theatrical Stage Employees (IATSE) pertaining to filming in "houses" under contract with Local 1 (to which it alleges Fox has specifically agreed to be bound) requires that crews be split between employees represented by Local 1 and those represented by Local 52. Local 1 also contends that its collective-bargaining agreement with Madison Square Garden requires outside companies using the Garden to employ Local 1 stagehands at least on a split-crew basis, and, that crew splittng would not impair efficiency, because the employees it represents possess the requisite skills to allow them to perform satisfactorily the disputed work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As set forth previously, Executive Producer Ray testified that Local 1 Business Representative McDonald refused his offer to hire two or three employees out of Local 1, insisted that the Employer's crew be split evenly between Locals 1 and 52, and threatened that, unless Ray complied, he would never get into the Garden. McDonald denied that he ever made such a threat. Ray also testified that,

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[3] McDonald contended that the first time he spoke with Ray was to get additional information about the Garden filming. He asserted that, during his conversation, Ray claimed International President Diehl had advised him that involving employees represented by Local 1 on the Garden shot would not be necessary. McDonald allegedly contacted Diehl immediately, who denied ever speaking with Ray. McDonald testified that he called Ray again and confronted him with Diehl's denial. Then he proceeded to discuss the crew-splitting agreement between Locals 1 and 52, rejected Ray's offer to hire three men, and terminated the conversation when Ray said that he would call Diehl.

[4] Ray testified that all the Garden sequences had to be filmed on June 4, because that was the only day during the New York shooting schedule that the Garden was available. Had filming not been completed on that day, Ray estimated that it would have cost at least $50,000 to return in the fall after shooting in other cities had been concluded, assuming that the cast and production crew could have been reassembled at that later date. Ray also noted that, due to later references to the Garden, the script could not have been rewritten to eliminate the movie's Garden sequences.

[5] McDonald testified that he spoke to Ray on Saturday, June 2, and Ray attempted to work out an arrangement whereby employees represented by Local 1 would not have to handle the equipment. McDonald allegedly replied that the crew-splitting agreement included an understanding that the work would also be split.

[6] Norton also denied threatening Ray.

on the morning of the shooting, he asked Frank Norton, a member and representative of Local 1 and a Garden employee, what would happen if he tried to get into the Garden without using his men, and Norton replied that he would be bounced out on his "ass." Norton also denied threatening Ray.

The Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding such a violation. A conflict in testimony does not prevent the Board from proceeding with a determination of the dispute under Section 10(k) of the Act.[7] Therefore, without ruling on the credibility of the testimony at issue, we find that such reasonable cause does exist.

We find no merit in Local 1's contention that there exists a method for the voluntary adjustment of the dispute to which the parties have agreed to be bound. Evidence indicating that Fox had sought out the International president of IATSE on a previous occasion to settle a jurisdictional dispute between the two Locals, and that Fox agreed to and did abide by the International's ruling, does not establish the existence of such a mechanism. Fox has no contract at all with Local 1 and, furthermore, neither Fox's contract with Local 52 nor the Garden's contract with Local 1 provides for tripartite arbitration. Nor was an independent document purporting to bind the three parties to a method for voluntarily adjusting the dispute offered, or referred to, by any party.

Having found reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, and that no voluntary method exists for the resolution of this dispute, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various relevant factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience reached by balancing those factors involved in a particular case.[9]

The following factors are relevant in making the determination of the dispute before us:

1. Employer preference

The record clearly establishes that Fox's unequivocal preference is to assign the disputed work to a crew made up solely of employees represented by Local 52. This factor, while not determinative, favors an award of the disputed work to employees represented by that labor organization.

2. Collective-bargaining agreements

Fox has had a continuous collective-bargaining relationship with Local 52 since 1968. It assigned the work in dispute to Local 52 in accordance with the terms of the 1975–78 collective-bargaining agreement[10] covering the performance of motion picture grip, electrician, and property work, which states in pertinent part as follows:

> No person other than an employee hereunder shall be permitted to handle, place, operate or procure scenery, property, special effects, electrical effects, electrical equipment, sound effects, sound accessories, playback or equipment at any time, or to construct any of the foregoing where such work is done by or under the control of the producer; and no interchangeability among the crafts shall be allowed.

Local 1, on the other hand, does not now have, nor has it ever had, a collective-bargaining relationship with the Employer,[11] although it does have a contract with Madison Square Garden. Local 1 claims that it is entitled to share the disputed work with Local 52 because its agreement with Madison Square Garden requires that Local 1 employees be used either exclusively, or in conjunction with an outside company's employees, whenever an outside company uses the Garden for filming, videotaping, or a live theatrical production.

In *Locals 27 and 48, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (CBS, Inc.)*,[12] the disputed work was the unloading and carrying of CBS television equipment from CBS trucks into the Coliseum in Richfield, Ohio, and the installation of temporary cable for a telecast of two basketball games. Pursuant to its collective-bargaining agreement with Local 1212 (IBEW), CBS assigned the work to employees represented by that union. Locals 27 and 48 (IATSE) did not have an agreement with CBS, but did have

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[7] *Construction, Production & Maintenance Laborers' Union, Local No. 383, affiliated with Laborer's International Union of North America, AFL-CIO (Floor Covering Specialists, Inc.)*, 222 NLRB 950, 952–953 (1976).

[8] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[9] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[10] The parties agreed to extend the 1975–78 labor contract while negotiations for a successor agreement continued.

[11] Fox admits that, during the filming of the motion picture "Turning Point" at a theater in New York City, it did make an arrangement with Local 1 in which it was agreed that employees represented by Local 1 would stage the event being filmed.

[12] 227 NLRB 142 (1976).

one with the Coliseum covering the same work. The Board found the collective-bargaining relationship between CBS and Local 1212 to be determinative in light of the control exercised by CBS over the manner and means by which the telecasts were to be made.

From the record evidence it is clear that Fox, like CBS, was the employer in control of the production, and that, similarly, the collective-bargaining agreement between itself and Local 52 establishes the latter's jurisdiction over the disputed work. Moreover, in this case, the relationship between Fox and the Garden is even more remote than the one which existed between CBS and the Coliseum. Here the Employer was not filming an event being performed in the arena; it simply used the empty Garden as a set. Accordingly, we find that the collective-bargaining agreement between Fox and Local 52 squarely covers the work in dispute, and thus favors assignment of the work to the employees represented by Local 52.[13]

3. Area practice and industry agreement

It is undisputed that film companies operating in New York City regularly and customarily assign grip, electrician, and property work on feature films to employees represented by Local 52. Local 1, however, claims it is a well-established practice for companies filming at locations in New York City under contract to Local 1 to split their crews evenly between employees represented by the two Locals. According to Local 1, the practice stems from an agreement between Locals 1 and 52 dating back several years, which was clarified in a 1962 ruling by International President Diehl, and upheld by the International's 1976 convention. In addition, it points to numerous examples of crew-splitting on motion pictures filmed in New York City theaters, and one in Madison Square Garden, as evidence that the film industry as a whole has agreed to be bound by the crew-splitting agreement.[14] Finally, Local 1 argues that Fox's compliance in 1976 with the International's resolution of a dispute over crew-splitting on the movie "Turning Point" establishes that Fox recognizes a contractual obligation to respect the terms of the agreement.

Local 52 denied that any agreement between itself and Local 1 to split crews ever existed. The evidence presented by Local 52 and Fox tended to show that, to the extent there is an area practice or an industry agreement, it is to have employees represented by Local 1 operate the "house" equipment over which they have jurisdiction whenever films are being shot in theaters and arenas under contract to Local 1. In the instant case, Fox notes that it used an empty Madison Square Garden as a backdrop for its performers, shooting the various scenes with its own equipment.[15] No evidence was introduced by Local 1 to indicate that a filmmaker has ever employed a split crew in a situation where no house equipment had been used.[16]

In light of the foregoing, we find that evidence of area practice and industry agreement is inconclusive and cannot support an affirmative award of the disputed work to employees represented by either local.

4. Efficiency and economy of operations

Fox and Local 52 contend that considerations of efficiency and economy militate strongly toward an award of the disputed work to employees represented by Local 52. According to Executive Producer Ray, motion picture crews function as a team, developing a certain cohesiveness as filming progresses, which is a critical factor in feature film making. Thus, Fox argues that requiring it to split its crew each time it enters a "house" under contract to Local 1 would mean forcing Fox to choose between two equally unattractive alternatives. It would either have to lay off half of its production crew and temporarily replace them with Local 1 stagehands, causing disruption among the employees already assigned and performing the disputed work (and also creating the risk that those laid off would be permanently lost to other jobs), or it could, as it did here, unnecessarily double the size of its crew.

Local 1 asserts that efficiency in film making is not dependent upon maintaining continuity in production crew personnel, and that film producers, including Ray, regularly substitute crewmembers when shooting in different cities. Local 1's assertions notwithstanding, the record makes it clear that injecting new crewmembers during the course of production opens the door to a certain degree of disruption. Maximum efficiency as well as technical and creative quality can well be expected to be a function of a filmmaker's ability to employ an experienced crew, one familiar with the daily routine and capable of working together as a team. Accordingly, we find that awarding the work in dispute to employees represented by Local 52 would

[13] *Local 84, International Alliance of Theatrical Stage Employees (CBS, Inc.)*, 218 NLRB 1312 (1975).

[14] Local 1 also introduced evidence, which Local 52 rebutted with evidence of its own, of an agreement among industry producers to recruit local stagehand employees when shooting at distant locations.

[15] To connect its equipment to the Garden's power supply, Fox employed employees represented by the International Brotherhood of Electrical Workers.

[16] During the filming of "Turning Point" in the Minskoff Theater, where it was necessary to use the theater's stage and equipment to film various scenes, Fox employed employees represented by Local 1.

eliminate the inefficiency inherent in the repeated hiring and laying off of crew personnel or the uneconomical doubling of crews.

5. Relative skills

The evidence indicates that Locals 1 and 52 both represent employees described as grips, electricians, and property men, and that employees represented by both Locals who are employed in those categories possess similar skills. Local 1 takes the position that although there are differences in the type of work generally performed by employees represented by Local 1 and Local 52, the employees it represents are fully competent and do in fact perform film work. Local 52 claims that, no matter how similar the skills possessed by Local 1 represented grips, electricians, and property men are, there exists substantial differences in the work generally performed by employees represented by the two Locals within the same category, and that employees represented by Local 1 could not possibly be as proficient in film making techniques as Local 52 motion picture mechanics who perform the work every day.

The record establishes that one of Fox's major concerns is the proper handling and use of its highly specialized and expensive equipment. A movie camera, for example, is worth at least $160,000. Dollies used to transport cameras and cameramen from place to place on the Garden sets ranged in value from $6,000 to $16,000, and the cumulative value of Fox's lighting equipment exceeded $200,000. The employees represented by Local 52 are highly skilled movie mechanics who are involved in motion picture production on a daily basis. The Local itself was chartered in 1924 as a studio mechanics local, and has represented motion picture grips, property men, and electricians for 56 years. Local 1, on the other hand, is primarily responsible for representing stagehands and crews that handle live theatrical performances. Some of the responsibilities of a grip represented by Local 52, for example, include constructing sets, dolly tracks, and shooting platforms, moving dollies and cranes, and moving cameras that are set up on dollies. In contrast, a grip represented by Local 1, more commonly referred to as a carpenter, has responsibilities which include setting up scenery, platforms, and other large units in the stage area, and moving or operating them as necessary. Accordingly, we find that the undisputed skills and training of employees represented by Local 52 to do the work, along with their greater industry experience, favor an award of the disputed work to them.[17]

[17] *Locals 27 and 48 (IATSE)*, 227 NLRB at 144.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors, we conclude that employees represented by Local 52 are entitled to perform the work in dispute. We reach this conclusion relying on the preference of the Employer, the collective-bargaining agreement between Fox and Local 52, promotion of efficiency and economy of operations, and the superior skills possessed by employees represented by Local 52. In making this determination, we are awarding the work in question to employees who are represented by Local 52, but not to that Union or its members.

Local 52 requests that the Board issue an award covering "the work of the grip, propertyman and electrician when film producers endeavor to shoot films in any place of amusement, including but not limited to legitimate theaters, Madison Square Garden, the Coliseum or any civic center of like nature." The Board has previously held that issuing an order involving other employers who have not had an opportunity to participate or give evidence is inadvisable.[18] The film producers contemplated by Local 52's request have not participated in this proceeding, nor have the other variables which may exist at the numerous "places of amusement" in New York City been presented to us for consideration. Accordingly, we deny Local 52's request to expand the scope of our award beyond the Employer in this proceeding and the jobsite in question.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

1. Employees represented by Motion Picture Studio Mechanics Local 52, IATSE, AFL-CIO, are entitled to perform the work of moving, handling, and placement of cables, props, dollies, cameras, and related equipment at Madison Square Garden in New York, New York, during Fox's filming of motion pictures using only the Employer's own equipment and the Garden as a backdrop for its own performers, and thus not entailing the filming of an event being staged at the Garden.

2. Theatrical Protective Union, Local One, IATSE, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force

[18] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 345 (Acme Sprinkler Company, Inc.)*, 210 NLRB 22, 25 (1974).

or require the assignment of the above work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Theatrical Protective Union Local One, IATSE, AFL-CIO, shall notify the Regional Director for Region 2, in writing, whether or not it will refrain from forcing or requiring Twentieth Century Fox-Film Corporation, by meansproscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.